RE: SRI ALAM SDN BHD; ABDUL RAHMAN ZAINAL (APPLICANT) & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN J
[POST WINDING-UP NOS: WA-28PW-94-02-2022
& WA-28PW-342-07-2022]
28 APRIL 2023

Abstract *– A 'cause has been shown' when a lack of independence and unbiasedness towards creditors of a company places the liquidators in a position of conflict of interest such as to rob them of real and apparent independence necessary for the conduct of a proper winding up of a company. This is sufficient for a court to apply its discretion in accordance with s. 458(1) of the Companies Act 2016 to remove the joint liquidators.*

COMPANY LAW: *Liquidators – Removal – Application for – Alleged breach of statutory duties – Non-compliance of consent orders – Failure to take steps to recover assets of company – Whether there was lack of independence and unbiasedness towards creditors of company – Whether 'cause has been shown' – Whether joint liquidators ought to be removed – Companies Act 2016, s. 458(1)*

COMPANY LAW: *Winding up – Members voluntary winding up – Application for removal of liquidators – Whether rr. 124 and 125 of Companies (Winding-up) Rules 1972 applicable – Alleged breach of statutory duties – Non-compliance of consent orders – Failure to take steps to recover assets of company – Whether there was lack of independence and unbiasedness towards creditors of company – Whether 'cause has been shown' – Whether joint liquidators ought to be removed – Companies Act 2016, s. 458(1)*

There were two notices of motion before this court, PW94 and PW342, filed by different applicants ('applicants') to remove Wan Idris Wan Ibrahim ('Wan Ibrahim') and Baltasar Maskor ('Baltasar'), the joint liquidators ('joint liquidators') of Sri Alam Sdn Bhd (in creditors voluntary liquidation) ('company') pursuant to ss. 453(2) and 521 of the Companies Act 2016 ('Companies Act'). In PW94, the applicant thereto had left the appointment of a new liquidator at the discretion of the court whilst in PW342, the applicant therein had also requested that, alternatively, one of the joint liquidators be removed on such terms as the court may impose and that, if the removal of the joint liquidators was allowed or alternatively, if one of the joint liquidators was removed, then Wan Mohamad Shukri ('WMS') be appointed as the sole liquidator of the company or as a joint liquidator of the company to replace either one of the present joint liquidators. Amongst the

grounds in support of the PW94 and PW342 ('motions') were (i) the creditors of the company supported the removal of the joint liquidators and the appointment of WMS; (ii) the joint liquidators had failed to act impartially; (iii) the joint liquidators failed to take steps to recover assets of the company; (iv) the joint liquidators had failed in their duty and were in breach of the consent orders; (v) the joint liquidators were in breach of their statutory duties; (vi) the joint liquidators had acted in their own interest; and (vii) it was in the interest of the creditors that the joint liquidators be removed. The company was a family-owned company of which the late Hj Ismail was the patriarch of the family and the *de facto* owner of the company which owned substantial assets. The company was subsequently placed into voluntary winding up some time on 26 February 2013 where Lim Tian Huat and WMS were appointed as joint liquidators of the company on 27 February 2013. Lim Tian Huat subsequently resigned leaving WMS as the sole liquidator. Some time in 2019, a suit was brought by the children of the late Hj Ismail against various parties including the applicants in the High Court ('Suit 487') which was resolved amicably. Three consent orders were recorded (i) consent order 1 where it was ordered, *inter alia*, that the joint liquidators were to instruct Messrs Cheah Teh & Su to receive compensation sum from Sepang Land Office for the company; (ii) consent order 2 where it was ordered, *inter alia*, that the joint liquidators were to (a) appoint solicitors in Singapore and in Malaysia; and (b) to instruct the solicitors to file such application to recover monies in the bank account in Bank Julius Beer & Co and Big Seven Investments Limited and/or any other bank; (iii) consent order 3 where it was ordered, *inter alia*, that (a) the present joint liquidators were appointed; (b) WMS resigned as liquidator of the company; and (c) the joint liquidators to pay costs to the interveners and creditors. The issues that arose herein were, *inter alia* (i) whether the appointment of the joint liquidators were detrimental as the joint liquidators appeared to serve the interest of the contributors; (ii) whether there was an alleged breach of statutory duty; (iii) whether the creditors of the company supported the removal of the joint liquidators and the *locus* of the applicant in PW94; (iv) whether the joint liquidators failed in their duty and in breach of the consent orders; and (v) whether it was in the interest of the creditors that the joint liquidators be removed.

Held (ordering accordingly):

(1) Although a consent order is in law an agreement between the parties to an ongoing litigation, this is not an entrenched position. So long as 'cause shown' is proved, a liquidator may be removed by the court. This decision would thus be consonant with s. 453(2) of the Companies Act where the court may, on 'cause shown', remove a liquidator. The submission that the applicants herein would be committing contempt in

the face of this court was misconceived. There was also no estoppel in this instance as the law is trite that there can be no estoppel operating against a statutory provision. (paras 15 & 16)

(2) In essence, a committee of inspection ('COI') represents the entire body of creditors and contributories. Any direction given by the COI must be given due consideration and the joint liquidators must comply with them unless for good reasons he/they think they should not be obeyed as to act otherwise would be acting contrary to s. 487 of the Companies Act due to the fact that 'their wish is his command.' Be that as it may, the decision to proceed with and make such decisions at the COI meeting of 19 November 2020 was improper, bearing in mind the absence of any of the members representing the creditors of the company and/or their solicitor. The proper course in such instance would have been for the joint liquidators to postpone the said meeting and fix it for another date and time. Accordingly, any decision made at the said COI meeting of 19 November 2020 would be invalid and of no effect. The decision to proceed with the impugned COI meeting of 19 November 2020 was indicative of the joint liquidators not being fair and just to the COI members representing the creditors of the company wherein the joint liquidators should at all times demonstrate that it was independent and unbiased towards any of the creditors or contributories of the company. (paras 20-25)

(3) The first creditors meeting was held on 25 January 2022, which was undisputed, wherein the OS342 creditors had, amongst others, voted for WMS to be appointed as the sole liquidator of the company. To this Messrs Khalek Awang & Associates ('Messrs Khalek') claimed that they were denied entry into the said meeting as the joint liquidators had, *vide* a letter, stated that pursuant to a notice of rejection of the proof of debt, Messrs Khalek was no longer a creditor to the company. However, Messrs Khalek was not a contingent creditor but a disputed creditor. Rules 124 and 125 of the Companies (Winding-up) Rules 1972, on the rejection of their proof of debt and the right to vote at a creditors meeting, were not applicable herein as the said aforementioned rules only apply to cases of a winding up order by a court or a creditors winding up, whereas the matter herein concerned a members voluntary winding up. Thus, Messrs Khalek had the necessary *locus* to appear in these proceedings and be heard by this court in respect of the applications herein. (paras 31-33)

(4) Although there were no timelines in the consent order 1 as to the recovery of the monies of the company in Singapore, this must be done within a reasonable period of the said consent order 2 and that the one letter sent on 5 June 2020 allegedly to one Mohamed Mustapha was insufficient in terms of a follow up as to the action needed to be taken

as there had been a lapse of almost two years from the date of the consent order 1 and no action had been taken as to the said recovery of the monies of the company in Singapore. This court found that the absence of any reasonable and/or valid explanation why the recovery of the said monies at this juncture would result in losses other than a bare assertion as being unjustified and improper. Consent order 2 should be complied with as it was a court order which continued to stand till to date and must be complied with due to the fact that it was an order of the court. (paras 40 & 41)

(5) As to the land compensation issue concerning eight pieces of land owned by the company, the joint liquidators did act on it by, *inter alia*, securing various payments from the Sepang Land Office between the periods of October 2020 and March 2021. However, consent order 1 did state that the land compensation sum was to be deposited with the legal firm of Messrs Cheah Teh & Su and to be placed in an interest bearing account until disposal of the action but this appeared not to have been done and no explanation had been forthcoming on this by the joint liquidators. This, once again, was an act which the joint liquidators should have adhered to as the same was no less than a court order. This would thus tantamount to another example of a 'cause shown' against the said joint liquidators. (paras 45-47)

(6) The lack of independence and unbiasedness towards the creditors of the company and the failure to abide by the consent order 1 and the consent order 2 by the joint liquidators were material factors to be considered by this court. There was a disrespect of the said court orders. In the circumstances, 'cause has been shown' from the evidence, on a balance of probabilities, and that it was sufficient for this court to apply its discretion in accordance with s. 458(1) of the Companies Act to remove the joint liquidators. It was therefore in the interest of all those who were interested in the company being liquidated, that the joint liquidators be removed. (paras 51-52)

Case(s) referred to:

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC ***(refd)***

Lee Teng Siong v. Lee Kheng Lian & Ors [2006] 4 CLJ 443 CA ***(refd)***

Ng Yok Gee & Anor v. CTI Leather Sdn Bhd; Metro Brilliant Sdn Bhd & Ors (Interveners) [2006] 3 CLJ 360 HC ***(refd)***

Re Tenaga Gagah Sdn Bhd [2022] 1 LNS 207 HC ***(refd)***

Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd [2019] 3 CLJ 791 CA ***(refd)***

Woodsville Sdn Bhd v. Tien Ik Enterprise Sdn Bhd & Ors [2000] 1 LNS 335 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 237

Companies Act 2016, ss. 453(2), 458(1), 487, 521

(Post Winding-up No: WA-28PW-94-02-2022)
For the applicant - Kelly Khoo Seo, Nur Dalila Zulkarnain & Abdul Rahman Zainal; M/s Malis & Khoo
For the present joint and several liquidators of the respondent - Ravenesan Sivanesan, Jacky Lai, Mohamad Daniel Hazizan & Wong Li Yen; M/s S Ravenesan
For the contributories - Ahmad Ezmeel Ahmad Tarmizi; M/s Ezmeel & Co
For the YD Planners and creditors of the respondent - Jason Chan, Lee Xin Yi, Khalek Awang; M/s S Mathews & Assocs

(Post Winding-up No: WA-28PW-342-07-2022)
For the applicant - Rajesh Kumar Gujinder Nath, Cheong Su Yin & Muhammad Afiq Ab Aziz; M/s Afiq Aziz & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nadzarin Wok Nordin J:

[1] Before this court, there are two notices of motion being one under Post Winding Up No. WA-28PW-94-02-2022 ("PW94") and the other under Post Winding Up No. WA-28PW-342-07-2022 ("PW342") filed by different applicants ("applicants") to remove Wan Idris bin Wan Ibrahim (Wan Ibrahim) and Baltasar bin Maskor ("Baltasar") the joint liquidators ("joint liquidators") of Sri Alam Sdn Bhd (in creditors voluntary liquidation) ("company") pursuant to ss. 453(2) and 521 of the Companies Act 2016.

[2] In PW94, the applicant thereto, had left the appointment of a new liquidator at the discretion of the court whilst in PW342, the applicant therein, had also requested that alternatively one of the joint liquidators be removed on such terms as the court may impose and that if the removal of the joint liquidators is allowed or alternatively if one of the joint liquidators is removed, then Wan Mohamad Shukri bin Wan Ab Kadir ("WMS") be appointed as the sole liquidator of the company or as a joint liquidator of the company to replace either one of the present joint liquidators.

[3] Amongst the grounds in support of the PW94 and PW342 ("motions") are the following:

(i) the creditors of the company support the removal of the joint liquidators and the appointment of WMS;

(ii) the joint liquidators have failed to act impartially;

(iii) the joint liquidators failed to take steps to recover assets of the company;

(iv) the joint liquidators have failed in their duty and are in breach of the consent orders;

(v) the joint liquidators are in breach of their statutory duties;

(vi) the joint liquidators acted in their own interest; and

(vii) it is in the interest of the creditors that the joint liquidators be removed.

[4] In PW94, several creditors of the company, namely Messrs Khalek Awang & Associates had filed an affidavit supporting the motions whilst YD Planners have indicated that they will also support the motions.

[5] Under PW342, the applicant therein was supported by eight other creditors being Arkitek Zainuddin, IRC Jurutera Perunding, Smart Survey Consultant, KA Associates, Messrs Zulkifli Yong, Zami & Co, Ahmad Badri bin Idris, Nik Adib bin Nik Jaffar, Noraini binti Zahari and Azrul Nazim bin Abdul Aziz (OS 342 creditors).

Background

[6] The company was a family-owned company of which the late Hj Ismail was the patriarch of the family and the *de facto* owner of the company which owned substantial assets.

[7] The company was subsequently placed into voluntary winding up sometime on 26 February 2013 where Mr Lim Tian Huat and WMS were appointed as joint liquidators of the company on 27 February 2013.

[8] Lim Tian Huat subsequently resigned some time on 13 February 2015 leaving WMS as the sole liquidator.

[9] Hj Ismail had thereafter on 30 March 2019 passed away.

[10] Some time later in 2019, a suit was brought by the children of the late Hj Ismail against various parties including the applicant in the High Court of Malaya at Kuala Lumpur Suit No. WA-24NCC-487-09-2019 ("Suit 487"). Suit 487 was resolved amicably where three consent orders were recorded:

(i) consent order dated 20 May 2020 ("consent order no. 1") where it was ordered *inter alia* that the joint liquidators are to instruct Messrs Cheah Teh & Su to receive compensation sum from Sepang Land Office for the company;

(ii) consent order dated 20 May 2020 ("consent order no. 2") where it was ordered *inter alia* that that the joint liquidators are to:

(a) appoint solicitors in Singapore and in Malaysia in respect of Case No: HC/S 358/2020, Sub Case No: HC/SUM 1754/2020 in the High Court of the Republic of Singapore; and

(b) to instruct the solicitors to file such application to recover monies in the bank account in Bank Julius Beer & Co and Big Seven Investments Limited and/or any other bank.

(iii) consent order dated 5 June 2020 ("5 June 2020 consent order/consent order no. 3") where it was ordered *inter alia* as follows:

(a) the present joint liquidators are appointed;

(b) WMS resigned as liquidator of the company; and

(c) the joint liquidators to pay costs to the interveners and creditors.

[11] The following creditors submitted their respective proof of debt ("POD") where most of the POD's were rejected by the joint liquidators. The POD's which were accepted and those which were accepted only in part are as follows:

No.	Creditor	Amount In POD (RM)	Amount Accepted (RM)	Amount Rejected (RM)
1	IRC Jurutera Perunding	588,780.75	225,000.00	363,780.75
2	Arkitek Zainuddin Harun	316,462.00	75,500.00	240,962.00
3	Smart Survey Consultant	999,846.41	160,572.50	839,273.91
4	KA Associates	231,506.02	-NIL-	231,506.02
5	Messrs Zulkifli Yong Azm	300,000.00	-NIL-	300,000.00
6	Ahmad Badri Bin Idri	184,000.00	-NIL-	184,000.00
7	Nik Adib Bin Nik Jaffar	16,636,000.00	Refused to accept	-NIL-
8	Noraini Binti Zahar	3,960,000.00	Not invited to file POD	-NIL-
9	Azrul Nazim Bin Abdul Aziz	960,000.00	Not invited to file POD	-NIL-
10	YD Planners	922,640.45	-NIL-	922,640.45
11	Abdul Rahman Bin Zainal	2,175,000.00	2,105,000.00	70,000.00
12	Messrs Khalek Awang & Associate	1,700,000.00	-NIL-	1,700,000.00

13	Messrs Azlina Abdul Aziz & Associates POD 1 POD 2 POD 3	 9,329,401.64 182,832.50 7,047,988.76	 -NIL- -NIL-	 182,832.507,047,988.76
14	Messrs Ainul Azam & Associates	142,256.00		
15	Messrs Zain Megat & Murad	3,931,000.00		3,931,000.00
16	Lembaga Hasil Dalam Negeri	18,808,505.17	14,701,996.96 (discounted)	4,106,508.21
	Total	**68,416,219.70**	**17,268,069.46**	**20,120,492.60**

Findings Of This Court

Consent Order 5 June 2020

[12] I will firstly deal with the consent order dated 5 June 2020 (5 June 2020 consent order) wherein I note that the appointment of the joint liquidators was premised on the 5 June 2020 consent order obtained at the Kuala Lumpur High Court in Originating Summons No. WA-24NCC-487-09-2019 ("OS 487"), which can be viewed at exh. AZH2 in encl. 3 of OS 342, where *inter alia:*

(i) Baltasar was appointed to act with Wan Idris, who was already a liquidator of the company at that stage and where WMS resigned;

(ii) all the costs of the interveners and creditors who were parties to the proceedings thereto were to be paid from the assets of the company; and

(iii) to which the creditors who are supporting the motions herein were also a party thereto.

[13] It was submitted by learned counsel for the applicant in PW94 that the creditors had agreed to the appointment of the joint liquidators premised on the following grounds:

(i) the existence of the Committee of Inspection ("COI") who would be able to give directions to the joint liquidators and protect the interest of the creditors;

(ii) the continued appointment of Wan Idris who would ensure the continuity of the work carried out by WMS;

(iii) the joint liquidators would remain impartial and independent; and

(iv) the affairs of the company had been unduly protracted since the death of the late Hj Ismail on 30 March 2019 due to the ongoing litigation between WMS and the contributories.

[14] The applicant in PW94 now contends that the appointment of the joint liquidators have proven detrimental to them as the joint liquidators appear to serve the interest of the contributories and they point out to various instances where the same has occurred. The joint liquidators on the other hand submit that some of the creditors, namely IRC Jurutera Perunding, YD Planners, Messrs Azlina Abdul Aziz & Associates, Messrs Zulkifli Yong Azmi & Co, Ahmad Badri bin Idris, Messrs Ainul Azam & Co and Abdul Rahman bin Zainal are precluded from appointing WMS as the liquidator of the company as they had in OS 487 applied that both WMS and Wan Idris be removed and be replaced with Baltasar as this would be a direct contravention of the consent order and would be committing contempt in the face of this court.

[15] It is to be observed that the said 5 June 2020 consent order does not contain a term therein for the liberty to apply to the court to vary the consent order and that some of the creditors as aforementioned were parties to the same. Although the consent order is in law an agreement between the parties to an ongoing litigation, see *Lee Teng Siong v. Lee Kheng Lian & Ors* [2006] 4 CLJ 443; [2006] 5 MLJ 609; I do hold that this is not an entrenched position, and I agree with learned counsel for the applicant in PW94 that so long as 'cause shown' is proven, a liquidator may be removed by the court. This decision would thus be consonant with s. 453(2) of the Companies Act 2016 where the court may on 'cause shown' remove a liquidator as the said section provides:

> (2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.

[16] Therefore, based on my reasoning above, there would be no necessity to set aside the 5 June 2020 consent order before the motions here are filed and that the submissions by learned counsel that the motions tantamount to a direct contravention of the 5 June 2020 consent order and the applicants therein would be committing contempt in the face of this court is in my respectful view misconceived. Further, I hold that there can also be no estoppel in this instance as the law is trite that there can be no estoppel operating against a statutory provision, see *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174.

COI Meeting 19 November 2020

[17] One of the matters raised by the applicant in PW94 is the fact of a meeting of the COI held on 19 November 2020 where allegedly none of the COI members were present save for the contributories representative, one Ahmad Azzam bin Ismail.

[18] To this I have firstly perused the minutes of the COI meeting held on 10 December 2020 which can be seen in encl. 2 of PW94 which was attended to by the joint liquidators and a few other members of the COI where it was minuted that the meeting of 19 November 2020 was cancelled as Ms Kelly Khoo, the lawyer for the COI had been unable to attend as she was a close contact of a (Covid-19) positive patient as well secondly, the "liquidators preliminary report to the court" dated 27 May 2022 marked as exh. BM2 in encl. 14 of WA-28PW-128-03-2022 (PW128) which referred to the meeting held on 19 November 2020 and where it was stated that the same was for "the purpose of the joint COI and contributory meeting was to brief on the status of the winding up process of SASB and to table the past and present fees of the solcitors client's basis and the current JL … However during the meeting, the COI members representing the creditors did not attend and the meeting proceeded with only the attendance of the contributory".

[19] Based on all of the above documentary evidence, I find that the COI meeting held on 19 November 2020 was proceeded with in the absence of the members representing the creditors of the company and was only attended to by the joint liquidators and Ahmad Azzam bin Ismail, the contributory representing the shareholders of the company as shown in Appendix 25 thereto.

[20] A COI in essence represents the entire body of creditors and contributories as per *Woodsville Sdn Bhd v. Tien Ik Enterprise Sdn Bhd & Ors* [2000] 1 LNS 335:

> Since a COI consists of creditors and contributories or their agents [section 242(1)], the COI represents the entire body of creditors and contributories, in whose interest a company is wound up and the liquidator acts in the winding up.
>
> The proceedings and constitution of a COI are regulated by section 242. The regulation as to changes in membership and as to conduct of meetings must be to ensure that the acts of the COI merit to be treated as representing the acts of the general body of creditors and contributories and also reflects the importance with which the legislature regards the COI.
>
> The COI is free to hold meetings, although the liquidator or any member of it may call a meeting of the COI if necessary [section 242(2)].

Section 241(1) says that the COI is "to act with the liquidator". A liquidator can exercise his powers under section 236(1) only with the authority of the Court or of the COI. In that respect the liquidator is subordinate to the COI.

Now for the important section 237, which I set out in full:

(1) Subject to this Part the liquidator shall in the administration of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection.

(2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.

(3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

(4) Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

Although subsection (4) requires the liquidator to "use his own discretion", that requirement, because of the words "Subject to this Part", which includes the rest of section 237, is qualified by the requirement in subsection (1) that the liquidator shall "have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection ...".

One thing to note is that the COI, as is the general body of creditors and contributories, are not advisers to the liquidator. They are people, as representing the creditors and contributories, who have claims on the company. They are the master. The liquidator is to serve their interests. So they are empowered, as they naturally should be, to give directions to the liquidator. Directions are akin to orders, and a direction given when there is a right to give it is *prima facie* entitled to obedience. Section 237 does not go so far as to oblige a liquidator to obey the directions of the COI, but it requires the liquidator to "have regard to" them. To have regard to them means to respect them and give them due consideration with a view to obeying them. Since the question is one of giving regard to directions, as opposed to advice, I would say that in law the liquidator is obliged to lean towards obeying them unless for good reasons he thinks they should not be obeyed. But in that case it would not be safe for them to simply proceed to act contrary to the directions. The safe course would be to summon a general meeting of the creditors or contributories under subsection (2) to ascertain their wishes, and if these coincide with the directions of the COI which the liquidator feels should not be obeyed,

then he should seek the directions of the Court under subsection (3). The point to appreciate is that if a liquidator complies with the directions of a COI or appears to lean towards complying with them, he is acting consistently with the intention of section 237. He would be acting contrary to section 237 if he were to treat the directions and wishes of the COI as of secondary importance and brush them aside in order to maintain an appearance of independence. Where the COI has a wish or gives a direction, the liquidator is not supposed to be independent and rely entirely on the use of his own discretion. He is supposed to first of all have regard to the wish or direction of the COI. I use the word "wish" because, in my opinion, a direction of the COI need not, for the purposes of section 237(1), appear as a direction. A wish of the COI is a direction to the liquidator. Their wish is his command.

[21] Although *Woodsville Sdn Bhd* (*supra*) was decided on the previous Companies Act 1965, I am of the view that it is equally applicable under the present Companies Act 2016 wherein s. 487 is almost identical to the previous s. 237 of the Companies Act 1965 and which s. 487 of the Companies Act 2016 provides:

(i) subject to this division, the liquidator shall, in the administration of the assets of the company and in the distribution among its creditors, have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall override any directions given by the committee of inspection in case of conflict.

(ii) the liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than ten per centum in value of the creditors or contributories.

[22] Hence, any direction given by the COI must be given due consideration and the joint liquidators must comply with them unless for good reasons he/they think they should not be obeyed as to act otherwise would be acting contrary to s. 487 of the Companies Act 2016 due to the fact that, and I borrow the words used by Abdul Aziz J (as he then was) in *Woodsville Sdn Bhd* (*supra*) that "their wish is his command".

[23] Be that as it may, based on my findings above, the decision to proceed with and make such decisions at the impugned COI meeting of 19 November 2020 is in my view improper bearing in mind the absence of any of the members representing the creditors of the company and/or their solicitor. The proper course in such instance would have been for the joint liquidators to postpone the said meeting and fix it for another date and time.

[24] Accordingly, any decision made at the said COI meeting of 19 November 2020 would, in my view, be invalid and of no effect. A

[25] I therefore hold that, the decision to proceed with the impugned COI meeting of 19 November 2020 as indicative of the joint liquidators not being fair and just to the COI members representing the creditors of the company wherein the joint liquidators should at all times demonstrate that it is independent and unbiased towards any of the creditors or contributories of the company. B

Alleged Breach Of Statutory Duty

[26] The applicants also argued that there were no creditors meeting since the 5 June 2020 consent order and thus the COI had directed them, *vide* a letter dated 18 November 2021 to hold a creditors meeting as per exh. AR4 in encl. 2 of OS94. Based on this letter there appears to have been two COI meetings, namely on 10 December 2020 and 8 January 2021 and that following from this letter, the joint liquidators had on 29 November 2021 stated in reply that it was: C D

(i) the prerogative of the COI to call for a meeting of the COI;

(ii) that they had kept the COI abreast of all current issues; and

(iii) that due to the movement control order ("MCO") they were unable to hold any meetings of the COI but were now prepared to summon a meeting of the creditors. E

[27] It was thus submitted by the applicants that the failure to hold a creditors meeting was in breach of s. 458(1) of the Companies Act 2016 which provides: F

(i) if the winding up continues for more than one year, the liquidator shall summon:

(a) in the case of a members' voluntary winding up, a meeting of members of the company; and G

(b) in the case of a creditors' voluntary winding up, a meeting of members of the company and the meeting of creditors, at the end of the first year from the commencement of the winding up and of each succeeding year or not more than three months after the succeeding year, and shall lay before the meeting an account of the acts of the liquidator and dealings and of the conduct of the winding up during the preceding year. H

(ii) the liquidator shall cause the notices of the meeting of creditors to be delivered by post to the creditors simultaneously with the delivery of the notices of the meeting of the company; and I

(iii) every liquidator who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding RM10,000 and, in the case of a continuing offence, to a further fine not exceeding RM500 for each day during which the offence continues after conviction.

[28] I find that due to the MCO, the joint liquidators had not acted in breach of s. 458(1) of the Companies Act 2016 and that this reason is perfectly acceptable as to why a creditors meeting was not yet held. In light of the same, the applicant's contention on this point is untenable.

[29] I however find that, there is no evidence before this court that the joint liquidators had at any material time suggested that the COI was at liberty to convene the creditors meeting on their own volition as contended by the joint liquidators in PW94.

Creditors Of The Company Support The Removal Of The Joint Liquidators And Locus Of Applicant In PW94

[30] In a winding up, the wishes of the creditors are to be considered, see this court's decision in *Re Tenaga Gagah Sdn Bhd* [2022] 1 LNS 207.

[31] The first creditors meeting was held on 25 January 2022, which was undisputed, wherein the OS342 creditors had amongst others voted for WMS to be appointed as the sole liquidator of the company. To this, Messrs Khalek Awang & Associates claim that they were denied entry into the said meeting as the joint liquidators had *vide* a letter dated 20 January 2022 to them, as found in exh. KA2 of encl. 9 in PW94, stated that pursuant to a notice of rejection of the proof of debt dated 22 October 2022, Messrs Khalek Awang & Associates, was no longer a creditor of the company.

[32] Learned counsel for Messrs Khalek Awang & Associates claim that they are not a contingent creditor but a disputed creditor. I agree with learned counsel for Messrs Khalek Awang & Associates that rr. 124 and 125 of the Companies (Winding-up) Rules 1972 on the rejection of their proof of debt and the right to vote at a creditors meeting are not applicable herein as the said aforementioned rules only apply to cases of a winding up by a court or a creditors winding up, whereas the matter before me concerns a members voluntary winding up.

[33] In the circumstances, I do agree that Messrs Khalek Awang & Associates has the necessary *locus* to appear in these proceedings and be heard by this court in respect of the applications before me.

[34] I have also taken note of the outcome of the creditors meeting held on 25 January 2022 whereby the resolution was approved to *inter alia* remove the present joint liquidators and replace them with either Mr Ralph Ravin Ratnasamy of Mustpaha Raj or Wan Mohd Shukri ("WMS") wherein an overwhelming majority of the creditors seeked the removal of the present

joint liquidators save for the difference of opinion in respect of who is to take over as the liquidator of the company as shown in exh. AR1 of encl. 2 of PW94.

[35] Such decision of the overwhelming majority of the creditors of the creditors meeting held on 25 January 2022 has to be considered for the purpose of my decision herein, although it is not the sole or dominant determinant factor for the court in an application to remove the joint liquidators herein.

Have The Joint Liquidators Failed In Their Duty Or Are They In Breach Of The Consent Orders

[36] To this, I must now address the consent order made on 20 May 2020 *ie*, consent order no. 1 at the Kuala Lumpur High Court in PW487 where *inter alia* it was ordered that the joint liquidators were to instruct Messrs Cheah Teh & Su to receive compensation sum from the Sepang Land Office and that the joint liquidators had failed to act on the same.

[37] In the same PW487, there is on the same date *ie*, 20 May 2020, another consent order *ie*, consent order 2 recorded. In this consent order no. 2, it was by consent ordered *inter alia* that the joint liquidators would appoint solicitors:

(i) in Singapore and in Malaysia, in respect of Case No: HC/S 358/2020, Sub Case No: HC/SUM 1754/2020 in the High Court of the Republic of Singapore;

(ii) to instruct the solicitor's to file such application/s that may be deemed necessary to claim ownership of the monies in the bank account of the Bank Julius Baer & Co Ltd and Big Seven Investments Limited or in any bank accounts in Singapore;

(iii) to appoint such other professionals including forensic professionals to assist in the claim of the monies in these bank accounts;

(iv) to agree with these solicitors and professionals for the payment of fees and disbursements in respect of item (i) above in Malaysia and Singapore;

(v) to create security to ensure payment of the fees and the disbursements in respect of item (iv) above; and

(vi) to make payment of such fees and disbursements payable to these solicitors and professionals.

[38] In so far as the consent order no. 2, it is alleged that the joint liquidators must comply with the same and where the joint liquidators responded to say that the recovery of the monies of the company in Singapore is due to the non-co-operation of Mohamed bin Mustapha, who is a director

of the company as well as the trustee and counsel member of Big Seven (L) Foundation, and that the recovery of the said monies at this juncture would result in losses. It is important here to note that the amount there of approximately USD10 million is rather substantial.

[39] After perusing the document entitled "liquidators preliminary report to court" dated 27 May 2022 ("preliminary report") of the joint liquidators at exh. AZH 10 in encl. 3 of PW342, I note that only one letter dated 5 June 2020 was allegedly sent to the said Mohamed bin Mustapha but the said letter was not exhibited before this court. There also does not appear to be any reason given by the joint liquidators in the said preliminary report as to why the recovery of the said monies at this juncture would result in losses and not be beneficial to the creditors and contributories of the company save for an averment as to the same.

[40] Although the joint liquidators submit that there are no timelines in the consent order no.1 as to the recovery of the monies of the company in Singapore; I hold that this must be done within a reasonable period of the said consent order no. 2 and that the one letter sent on 5 June 2020 allegedly to the said Mohamed bin Mustapha is insufficient in terms of a follow-up as to the action needed to be taken as there has been a lapse of almost two years from the date of the consent order no. 1 and no action has been taken as to the said recovery of the monies of the company in Singapore. I also find the absence of any reasonable and/or valid explanation why the recovery of the said monies at this juncture would result in losses other than a bare assertion as being unjustified and improper.

[41] On the above point, the joint liquidators had also submitted that there were sufficient assets in Malaysia at their disposal to utilise towards payment of any purported creditors should their debts be proved. With respect, I find this submission as being untenable and that the consent order no. 2 should be complied with as it is a court order which continues to stand till to date and must be complied with due to the fact that it is an order of the court.

[42] It was also contended that the joint liquidators did not act on the terms of the 5 June 2020 consent order where it was clear in that order that the interveners costs would be decided and approved by the COI.

[43] I however find that, the terms of the 5 June 2020 consent order did not specify that the interveners costs would be decided and approved by the COI but had only stated that all the costs of the interveners and creditors who were parties to the proceedings thereto were to be paid from the assets of the company.

[44] In this respect, I agree with the joint liquidators that the interveners had in PW487 applied to the High Court to tax their costs and which culminated in a consent order dated 27 January 2022 for the joint liquidators to pay RM11,250 to each of the interveners and this can be seen in exh. BM19 of encl. 10 of OS 342. This order of 27 January 2022 would thus overtake the approval by the COI on 10 December 2020 that the interveners be paid a total of RM30,000 per intervener.

[45] As to the land compensation issue ("land compensation") concerning eight pieces of land owned by the company received from Tenaga Nasional Berhad, it was contended by the joint liquidators that they had explained the payments thereto in their preliminary report to which I have read and find that *inter alia*:

(i) the joint liquidators did secure various payments from the Pejabat Tanah Daerah Sepang amounting to RM32,287,568.83 between the periods of October 2020 and March 2021 and have filed a fresh valuation report for additional compensation which is pending appeal at the court as well as written to the relevant authorities for late payment interest amounting to RM3,446,906.84;

(ii) the joint liquidators did attend court on another piece of land known as GRN 333448 Lot 34394 where there was allegedly a fabrication for the purchase of the land wherein the compensation of RM5,981,040 awarded by the Shah Alam High Court *vide* Suit No. BA-24NCVC-944-07-2019; and which was ordered to be deposited with the court pending further relief; and

(iii) all payments have been accounted for as per the Form 75 dated 24 June 2022 as filed with the Companies Commission of Malaysia ("CCM").

[46] In this respect, I do find that the joint liquidators did act on the land compensation and that the accusation that the joint liquidators did not do anything on this point is thus misconceived. I however, as mentioned above, observed that the consent order no. 1 did state that the land compensation sum was to be deposited with the legal firm of Messrs Cheah Teh & Su and to be placed in an interest-bearing account until disposal of the action but this appears not to have been done and no explanation has been forthcoming on this by the joint liquidators.

[47] I do hold that this non-compliance of the consent order no. 1 by the joint liquidators with regards the land compensation sum to be deposited with the legal firm of Messrs Cheah Teh & Su as being, once again, an act which the joint liquidators should have adhered to as the same is no less than a court order. This would thus tantamount to another example of a 'cause shown' against the said joint liquidators.

Have The Joint Liquidators Acted In Their Own Interest

[48] The applicants contend that the joint liquidators have acted in their own interest when they attempted to prevent their own removal by the filing of an injunction which was eventually dismissed by the court on 24 January 2022. To this, the joint liquidators have contended that the filing of the injunction by them was due to the late introduction of a purported resolution to remove them and to appoint one Ralph Ravin Ratnaswamy in their place which they submit can only be done by an order of the court.

[49] I therefore am unable to agree that the joint liquidators have acted in their own interest by the filing of the said injunction and hold that the act of filing of an injunction is reasonable and justifiable in the circumstances.

Is It In The Interest Of The Creditors That The Joint Liquidators Be Removed

[50] From my decision above, I do hold:

(i) the lack of independence and unbiasedness towards the creditors of the company in the joint liquidators decision to proceed with the impugned COI meeting of 19 November 2020 has placed the joint liquidators in a position of conflict of interest such as to rob them of the real and apparent independence necessary for the conduct of a proper winding up;

(ii) that the joint liquidators failure and/or delay to comply with the consent order no. 2 amounts to a failure to take steps to recover assets of the company in Singapore is a valid complaint; and

(iii) the non-compliance of parts of the consent order no. 1 by the joint liquidators with regards the land compensation sum to be deposited with the legal firm of Messrs Cheah Teh & Su has also been shown to the satisfaction of this court.

[51] I consequently hold that the lack of independence and unbiasedness towards the creditors of the company and the failure to abide by the consent order no. 1 and the consent order no. 2 by the joint liquidators as being material factors to be considered by this court.

[52] There is in this court's opinion a disrespect of the said court orders. In the circumstances, I find that 'cause has been shown' from the evidence as mentioned above by me, on a balance of probabilities and that it is sufficient for this court to apply its discretion in accordance with s. 458(1) of the Companies Act 2016 to remove the joint liquidators.

[53] I respectfully repeat what this court has stated in *Re Tenaga Gagah Sdn Bhd* [2022] 1 LNS 207 where the court held:

[50] In the circumstances after giving due consideration to the respective case laws above mentioned, it can be summarised that:

50.1. cause must be shown before a liquidator can be removed and that the normal grounds for removal are that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict;

50.2. a liquidator may be removed if it is in the interest of all those who are interested in the company being liquidated

50.3. due cause does not require misconduct or personal unfitness on the part of the liquidator to be established, and that it suffices to show that the creditors were justified in losing confidence in his ability to carry on the liquidation effectively

50.4. where a liquidator disregards the wishes of creditors in an insolvent company and the wishes of the contributories in a solvent company, it may be sufficient cause on which the court may act in removing a liquidator

50.5. the wishes of the creditors and contributories must be taken into account if relevant

50.6. the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way

50.7. the court will not interfere with the decision simply because its opinion might differ from that of the liquidator

50.8. where two or more liquidators are appointed, the liquidators must act together

50.9. the threshold to remove the joint liquidator who acts in conflicts between them and their inability to work together, is lower when contrasted with the removal of single liquidator.

[54] From the above, I also adopt the test to be applied by the court in removing a liquidator is as per the Court of Appeal in *Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd* [2019] 3 CLJ 791; [2019] 12 MLJ 184 which held:

[14] The threshold to satisfy 'cause shown' is not high but there must be a clear evidence justifying the removal. The phrase 'cause shown' is generic in nature and will include the following: (a) some unfitness of the person; (b) there must be some justifiable reason for the removal; (c) he has not properly exercised his discretion; (d) have placed themselves in the position of conflict of interest such as to rob them of the real and apparent independence necessary for the conduct of a proper winding up (see *In re Papua New Guinea Block Co Pty Ltd* [1980-84] LRC (Comm) 676; *In re Sir John Moore Gold Mining Company* (1879) 12 Ch D 325; *Re Keypak Homecare Ltd* [1987] BCLC 409 (Ch D); *Hong Investment Pte Ltd v. Tai Thong Hung Plastics Industries (Pte) Ltd* [2010] SGHC 375)

[55] I am thus satisfied, based on my above findings, that it is in the interest of all those who are interested in the company being liquidated, that the joint liquidators be removed, see *Ng Yoke Gee & Anor v. CTI Leather Sdn Bhd* [2006] 3 CLJ 360; [2006] 7 MLJ 28.

Decision

[56] Consequently, from my above said findings I hold that the joint liquidators should be removed as 'cause shown' has been proven to the satisfaction of this court and I grant order in terms for encl. 1 of PW94 prayers 1 and 3. In such circumstances the prayers sought for in encl. 1 of PW342 is now academic save for prayer 5 therein I grant and the rest of the prayers therein are to be dismissed.

Choice Of Proposed Liquidators

[57] Following from my decision above, this court will now have to consider the proposals for the replacement of the current joint liquidators and to this it is to be noted that Messrs Khalek Awang & Associates has proposed Ralph Ravin as a liquidator and the applicant in PW94 has not suggested any proposed names for the position of the liquidator whilst the applicant in PW342 has proposed Wan Mohamad Shukri ("WMS") be appointed as the sole liquidator to replace the present joint liquidators.

[58] As to WMS's appointment, the opposition to the same is that he should be prohibited from acting as the liquidator due to the consent order in PW487 where the contributories had filed an action to remove both WMS and Wan Idris to be replaced with Baltasar but that the consent order thereto, which some of the creditors in support of WMS appointment now, had stated that WMS was to resign and Wan Idris remain as liquidator with Baltasar as the joint liquidator. This would, as submitted, be a direct contravention of the said consent order.

[59] I also note from the preliminary report, that WMS has despite numerous requests from the joint liquidators, refused and/or have not complied to date to hand over certain documents which were in his possession.

[60] As there may be an apparent bias due to the above issues on WMS, this court does not think that he is a suitable candidate to be the liquidator to replace the current joint liquidators.

[61] I will now turn to whether the appointment of Ralph Ravin as a liquidator is suitable in the circumstances. Based on the creditors meeting on 25 January 2022, the majority in value of the creditors therein, support his appointment.

[62] I have also perused Mr Ralph Ravin's curriculum vitae filed in PW94 and find that he has more than ten years of experience in this line and that he has the necessary qualifications, professional experience and attributes to be a liquidator. From this background as well as the fact that I believe that his neutrality would be in the overall best interest of the creditors and contributories of the company, this court hereby appoints Mr Ralph Ravin Ratnaswamy as the liquidator of the company and accordingly grant order in terms for prayer 2 as per encl. 1 of PW94.

A

B

C

D

E

F

G

H

I